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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

GITTA VAUGHAN, as Trustee, etc.,

Plaintiff and Respondent,

v.

RANDHIR HEER,

Defendant and Appellant.

C086904

(Super. Ct. No. 34-2014-
00171630)

Respondent Gitta Vaughan, trustee of the Christian Engel 2004 Revocable Trust (trust), sought and obtained an order approving a partition by sale of three contiguous parcels of property (property) partially owned by the trust. Appellant Randhir Heer, who owned a half-interest in the property, appeals the probate court's order approving the partition by sale.

Citing Probate Code section 10311,¹ Heer argues that the probate court abused its discretion by failing to consider his overbid offer to purchase the property, which he claims was more than the successful bidder's offer. Vaughan, in turn, claims that the order is not appealable, that section 10311 does not apply, and that the appeal is frivolous, intended only to delay the underlying partition sale. She moves for sanctions against Heer.

We conclude that the partition order is appealable, but section 10311, which applies to the sale of real property in the administration of a decedent's estate, does not apply here. We nevertheless reach the merits of Heer's contention regarding consideration of his overbid offer for reasons we explain *post*.² On this record, we cannot say that the probate court abused its discretion in confirming the partition sale. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In 2004 Christian Engel established the trust and named Vaughan as trustee. The trust had a total of five beneficiaries, including Vaughan. At the time of Christian Engel's death in 2007, the trust included as an asset an undivided 50 percent interest in the property. Christian Engel's ex-wife, Dominique Engel, also owned an undivided 50 percent interest in the property.³

In 2014 Vaughan, as trustee of the trust, filed a Petition for Instructions to Determine Title and Require Partition and Transfer of Real Property. Dominique and the remaining beneficiaries were named as respondents in the action, which was filed

¹ Further undesignated statutory references are to the Probate Code.

² In view of this disposition, we deny Vaughan's motion for sanctions.

³ Because Christian and Dominique Engel share a surname, we refer to them by their first names to avoid confusion.

pursuant to sections 17200, 17200.1, and 850 et seq. Heer was not a party to the original petition. The trust beneficiaries consented to listing the entire property for sale for \$2,900,000.

On March 16, 2015, after finding that the trust and Dominique each owned an undivided 50 percent interest in the property, the probate court granted Vaughan's petition and ordered a partition by sale of the entire property. Vaughan was authorized to negotiate any offers made on the property, to lower the listing price based upon market conditions, and to enter into a purchase and sale agreement subject to court approval.

Approximately 10 days after the probate court entered its order granting the petition for partition by sale, Dominique gifted her interest in the property to Heer. Heer then encumbered the property with a deed of trust claiming that the property was collateral for a \$3,000,000 promissory note from braincity.us. According to a fictitious business name statement filed by Heer, braincity.us was his fictitious business name, and braincity.us had the same business address as Dominique.

In May 2015 Vaughan filed a petition to cancel Heer's sham deed of trust and to bind Heer to the probate court's March 16, 2015 order directing the property be partitioned by sale. At a subsequent proceeding, the court found that Dominique and Heer "conspired to avoid the Court's Order." The court specifically found that Heer's deed of trust was a sham and that he had never received a \$3,000,000 loan from braincity.us; Heer failed to produce evidence of the alleged promissory note or transfer of funds in either discovery or at trial. The court ordered that Heer was bound by the March 2015 order granting the petition to partition the property by sale and cancelled the sham deed of trust.

A month later, in June 2015, Vaughan filed a Petition for Order Approving Sale of Real Property, which sought the court's approval of a purchase and sale agreement she had negotiated with Hartford Land Management for approximately \$2,000,000. The court approved the sale.

The sale to Hartford Land Management fell through. Vaughan negotiated a second sale with Stan Frank for a similar price, and the court again approved the sale.

The sale to Stan Frank also fell through. Vaughan therefore negotiated a third purchase agreement with Ionic Enterprises, LLC, under similar terms. She filed a new motion to approve the sale in November 2017.

The motion to approve the sale to Ionic Enterprises was heard on February 6, 2018. The probate court granted the motion, approved the purchase agreement with Ionic Enterprises, and directed the partition by sale to proceed. The court also incorporated all of its prior orders in the matter relating to the sale of the property. The minute order for the hearing states: “The Court considered the Objections. The Court grants Petitioner’s Motion and further approves and orders the sale of the property to Ionic Enterprises, incorporating the terms of the Court’s prior orders relating thereto.”⁴ The formal written order, filed on February 8, 2016, states that “Respondent orally objected to the motion; however, no written objection was filed prior to the Court hearing.”

Heer appealed the February 8 order, citing “Probate Code section 1300” as the basis for his appeal. He has elected to proceed without a record of the oral proceedings in the superior court.

DISCUSSION

I

Appealability

Vaughan first contends the appeal must be dismissed because the order granting her motion to approve the sale of the property and for instructions to escrow is not appealable. We disagree.

⁴ Heer’s opening brief states, without any supporting citation to the record, that he “presented the Court, in writing, an overbid for the subject property at \$2,100,500.00.” No written bid or other objection appears in the record, however.

Code of Civil Procedure section 904.1, subdivision (a)(9) authorizes appeals to be taken “[f]rom an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made.” (Code Civ. Proc., § 904.1, subd. (a)(9); see also *id.*, § 872.720, subd. (a) [“[i]f the court finds the plaintiff is entitled to partition, it shall make an interlocutory judgment that determines the interests of the parties in the property and orders the partition of the property”].)

Here, the probate court’s order approved the purchase agreement with Ionic Enterprises and directed that partition of the property be made by sale. The order also incorporated the court’s previous orders that determined the parties’ respective rights and interest in the property. The order, then, constitutes an interlocutory judgment within the meaning of Code of Civil Procedure section 904.1, subdivision (a)(9), and is appealable. (*Solis v. Vallar* (1999) 76 Cal.App.4th 710, 713 [interlocutory judgment directing the partition and sale of property is appealable under Code of Civil Procedure section 904.1, subdivision (a)(9), and subsequent order confirming a partition sale constitutes an appealable order after judgment].) While it is true that Heer did not cite that code section in his notice of appeal, we construe the notice of appeal liberally (Cal. Rules of Court, rule 8.100(a)(2)) and reach the merits of the appeal.

II

Approval of Partition by Sale

Heer argues that the probate court abused its discretion in denying his purported overbid offer and failed to follow the procedures for the sale of property under section 10311. We disagree.

Section 10311 provides that subject to certain exceptions, if a written offer to purchase a decedent’s real property is made to the probate court at the hearing on the petition for confirmation of the sale, the court shall accept the offer and confirm the sale

to the offeror if certain conditions are satisfied. (§ 10311, subd. (a).)⁵ As Vaughan points out, section 10311 applies when administering a decedent's estate.

The statute is included in division 7 of the Probate Code, which governs the administration of the estates of decedents. (§ 10311 [contained in article 6, chapter 18, part 5 of division 7.]) The provisions governing trusts are included in Division 9. (§§ 15001 et seq. [provisions apply to all trusts], 17200.1 [transfer of property of trust], contained in article 6, chapter 18, part 5, division 9).)

In this case, Vaughan filed the petition for an order partitioning the property by sale under sections 17200, 17200.1, and 850, which apply to the sale of trust property. The provision governing the sale of a decedent's real property under section 10311 simply does not apply to the present proceeding.

While Vaughan argues that the inapplicability of section 10311 renders the present appeal frivolous, we disagree.⁶ We note that an almost identical provision for written overbids exists in the statutes governing partition actions in circumstances such as these. (Code Civ. Proc., § 872.210 [a co-owner of real or personal property may bring an action for partition]; see also, *Parker v. Owen* (1950) 96 Cal.App.2d 78 [discussing similarity between section 785 [a predecessor statute to section 10311] and Code of Civil Procedure section 784 [a predecessor statute to Code of Civil Procedure section 873.740].) Code of

⁵ Section 10311 provides in relevant part: “(a) Subject to subdivisions (b), (c), (d), and (e), and except as provided in Section 10207, if a written offer to purchase the real property is made to the court at the hearing on the petition for confirmation of the sale, the court shall accept the offer and confirm the sale to the offeror if all of the following conditions are satisfied: [¶] (1) The offer is for an amount at least 10 percent more on the first ten thousand dollars (\$10,000) of the original bid and 5 percent more on the amount of the original bid in excess of ten thousand dollars (\$10,000). [¶] (2) The offer is made by a responsible person. [¶] (3) The offer complies with all provisions of law.”

⁶ Because we do not find Heer's appeal frivolous, we deny Vaughan's motion for sanctions.

Civil Procedure section 873.740 provides in relevant part: “(a) If at the hearing under [Code of Civil Procedure] section 873.730 [to confirm a partition sale] a responsible bidder makes a written increased offer that exceeds the sale price by at least 10 percent on the first ten thousand dollars (\$10,000) and 5 percent on the amount in excess thereof, the court in its discretion may do either of the following: [¶] (1) Vacate the sale and direct that a new sale be made. [¶] (2) Vacate the sale, accept the increased offer, and confirm the sale to the offerer.”

We next consider whether the probate court abused its discretion in approving the sale to Ionic Enterprises and directing the partition by sale to proceed over Heer’s objection. (*Cummings v. Dessel* (2017) 13 Cal.App.5th 589, 597 [“[t]he standard of review for an interlocutory judgment of partition is abuse of discretion”].) “Under that standard, [t]he trial court’s “application of the law to the facts is reversible only if arbitrary and capricious.” ’ ’ (*Ibid.*)

By its express terms, Code of Civil Procedure section 873.740 requires a written offer to purchase the property that exceeds the current offer by a specified amount. (*Id.* at subd. (a).) Here, no written offer appears in the record on appeal. Thus, the terms of the relevant code section were not met. (See *Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364 [“When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two”].)

Heer elected to proceed on appeal without a reporter’s transcript of the hearing. The absence of a reporter’s transcript on appeal is significant. (*Allen v. Toten* (1985) 172 Cal.App.3d 1079, 1082; *Krueger v. Bank of America* (1983) 145 Cal.App.3d 204, 207.) “A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.” (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) “This presumption has special significance when, as in the present case, the appeal is based upon the clerk’s transcript.” (*Ehrler v.*

Ehrler (1981) 126 Cal.App.3d 147, 154.) In a “judgment roll” appeal, we must conclusively presume evidence was presented that is sufficient to support the court’s findings. (*Ibid.*) “ ‘[T]he question of the sufficiency of the evidence to support the findings is not open.’ ” (*Allen*, at p. 1082.) We do not presume the record contains all matters material to a determination of the points on appeal unless the asserted error “appears on the face of the record.” (Cal. Rules of Court, rule 8.163; *Nat’l Secretarial Serv. v. Froehlich* (1989) 210 Cal.App.3d 510, 521.)

Here, the face of the record shows that Heer did not submit a written overbid as required by the statute, but rather only objected orally as reflected in the probate court’s order. This was insufficient to constitute a proper overbid.

By its terms, subdivision (a) of Code of Civil Procedure section 873.740 also requires an overbid from a “responsible” bidder. Although the statute does not define the term “responsible bidder,” in other contexts “[a] bidder is responsible if it can perform the contract as promised.” (*Valley Crest Landscape, Inc. v. City Council* (1996) 41 Cal.App.4th 1432, 1438 [discussing the meaning of “responsible bidder” in the context of public agencies awarding significant contracts to the lowest responsible bidder in competitive bidding contest].)

In this case, the court had previously found that Heer had encumbered the property with a sham deed of trust, and that he and Dominique had conspired to circumvent the court’s original order directing the partition by sale. Based on this evidence, it is reasonable to assume that the court did not consider Heer a “responsible bidder” as required by the partition statute.

DISPOSITION

The judgment is affirmed.

/s/
Duarte, J.

We concur:

/s/
Raye, P. J.

/s/
Robie, J.